85-884

Supreme Court, U.S.
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CASE NO.

in the
Supreme Court
of the
United States
October Term, 1985

R BANKS, ET AL,

Petitioners,

vs.

PAN AMERICAN WORLD AIRLINES and ELIZABETH HANFORD DOLE, SECRETARY OF TRANSPORTATION,

Respondents.

On Petition for Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a delay in payment of damages in excess of eight years, in the face of an express order of the Civil Aeronautics Board requiring payment within 110 days of a dispute, constitutes a "taking" within the meaning of the Fifth Amendment to the United States Constitution?

Whether the above delay entitles Petitioners to "prejudgment interest" to fully compensate them for Pan Am's use of their funds for eight years?

Whether the Civil Aeronautics Board must defer to the NLRB's policy of payment of prejudgment interest, since the CAB has no independent labor policy?

1. The Petitioners are: Banks, R., Adams, C.L., Albers, R.H., Arnett, C.B., Barton, P.F., Carson, P.A., Dereemer, W.S., Dunn, M.J., Finnegan, W.F., Ganser, R.J., Girouard, N.G., Griffin, J., Guenter, G.E., Gustie, J.B., Hayes, C.T., Kurz, F.C., Long, J.F., Allen, W.H., Axelssen, K.M., Banks, R.V., Blake, R.G., Boivin, P.F., Bornn, M.L., Bowles, H.F., Jr., Brandt, G.W., Brodeur, K.D., Callahan, T.D., III, Lowry, D.K., McEachran, R.B., Nelson, D.L., North, D.M., O'Malley, J.P., Pfrang, K.M., Rhodes, R.B., Ridgway, J.J., Riley, J.H., Rime, R.G., Ripka, J.H., Shinn, J.F., Hilton, D.P., Kaseote, G., Slauson, J.P., Steer, R.A., Lang, C.A., Levendoski, R.J., Lindgren, E.R., Lindseth, C.D., Littlefield, G.M., Logan, R.T., Madden, W.J., Maiellaro, E.A., Maker, R.E., Markl, A.C., Holtgrave, F.W., Hopkins, G.B., Hopkins, M.R., Hovland, C.A., Hruska, J.D., Jillson, W.K., Kenedy, N.D., Kennedy, D.E., Keppen, K.H., Knoch, H.J., Knox, R.J., Riederich, J.B., Rypel, R.J., Sanders, K.C., Schmidt, F.E., Scott, B.D., Sedor, S.M., Shotz, D.S., Simpson, H.B., Slattery, J.A., Somoya, R.D., Speirs, E.J., Carson, G.P., Collier, R.L., Cone, K.B., Cook, J.W., Daily, R.O., McCrea, G.L., Stagliano, A.C., Tarto, W.L., Thompson, B.H., Ulehla, A.R., Vampatella, P.V., Weaver, W.A., Wendt, D.K., Wessinger, M.R., West, M.F., Wetmore, D.W., Wiggins, R.H., Dubois, J.A., Everts, R.A., Fielack, L.M., Fisher, D.L., Fitzerald, R.S., Frazier, J.F., Garrett, G.P., Gilkes, D.E., Griffith, R.L., Grofcsik, J.S., Gunst, R.P., McIsaac, W.E., Montgomery, A.P., Naert, R.J., Notis, T.T., Davenport, C.A., Dewey, G.G., Ditter, S.M., Dolliver, P.H., Drisko, R.L., Bungarz, Bob, Godleski, F., Paskevicz, Louis, O'Ryan, J.F., Parker, R.H., Spring, T.J., Pipkin, R.M., Rankin, A.M., Rhodes, H.W., Wilson, F.W., Young, W.W.

2. The Respondents are: Pan American World Airlines and Elizabeth Hanford Dole, Secretary of Transportation.

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OPINIONS BELOW

On June 25, 1985, the United States Court of Appeals for the Eleventh Circuit entered an Order denying Petitioners request for review of an Order of the Civil Aeronautics Board (CAB) (Appendix 1).

The CAB's Order is attached (Appendix 3 & 4) as well as the Order Denying Petitioners' Motion for Reconsideration (Appendix 2).

JURISDICTIONAL STATEMENT

This Petition seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit entered on June 25, 1985. Petitioner then filed this timely Petition for Certiorari.

The Jurisdiction of this Court is invoked pursuant to 28 USC Sec.1254(1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners' claims are based on the equal protection guarantee of the due process clause of the fifth amendment to the United States Constitution. This provision is set forth below:

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime—unless on a presentment or indictment of a Grand Jury—except in cases arising in the land or naval forces, or in the Militia, when in actual service

in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In order to alleviate severe financial problems in 1975, Pan American World Airlines (Pan Am) and Trans World Airlines (TWA) entered into an Agreement, which called for each carrier to suspend operations on certain major worldwide routes, thereby leaving the other as the only United States carrier on those routes. The Federal Aviation Act, 49 U.S.C. 1378(b), at that time, required prior CAB approval of any suspension of service by U.S. carriers, the Agreement was submitted to the CAB for approval and exemption under the anti-trust laws. After granting its approval, the Board issued supplemental Order 75-4-4 (April 1, 1975), imposing Labor Protective Provisions (LPPs) on Pan Am and TWA. In imposing the LPPs, the Board stated that the provisions were necessary to promote the stability and efficiency of the air transportation system.

Under Section 4(a) of the LPPs, an employee is entitled to a dismissal allowance if he loses his job as a result of the Agreement. In 1976 and 1977 Pan Am furloughed several hundred of its flight engineers, most of whom claimed dismissal allowances under the LPPs. Pan Am denied the claims but agreed to arbitrate the

matter. The arbitration hearing, orginally scheduled for July 1976, was postponed by Pan Am without the consent of all the parties, for 19 months pending the CAB'S decision on another route exchange agreement involving Pan Am. After the hearings the arbitrator ruled that 171 flight engineers lost their jobs because of the route swap. In 1981 the arbitrator determined the "Banks Group" claimants were entitled to the allowances; that is, which claimants were furloughed because of the route exchange.

The claimants then asserted that they were entitled to interest on their dismissal allowances from the date they became elegible for those benefits. In response, the Arbitrator stated in his Scope Opinion of March 24, 1982 that because Section 4 of the LPPs did not authorize an award of interest, he was without jurisdiction to consider the issue. A number of successful claimants, the "Rankin Group", (now the "Banks Group" since the Group has enlarged) submitted the interest issue to the CAB for its consideration. The Board denied the interest claim in Order 83-8-51 (August 10, 1983), citing as its reason the lack of authority within the terms of the LPPs. Upon petition by the Rankin Group, the Board denied reconsideration in Order 83-12-29 (December 28, 1983). Petitioners here, seek review of the Board Order denying interest. The 11th Circuit Court of Appeals denied the Banks Group application for review.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for three reasons. *First*, in order to redress the denial of equal protection under the law that was effected by the affirmance by the Eleventh Circuit of the CAB Order

denying to petitioner prejudgment interests on the sums due to them pursuant to the LPPs.

The premise is that petitioner airline employees had two valuable rights taken away from them by the CAB's allowance of the route swap. The right to protection under the laws of the United States from anti-competitive, monopolistic, behavior on the part of the airline and also the right to protest by way of labor unrest and strikes, from the effect of the suspension of those laws upon them.

For the taking of these valuable rights, the petitioners were offered compensation under the LPP's. Compensation which under our system of justice amounts to very little else than money. It is well established that money and its use has a time value. *See Dickman v. Commissioner*, 104 S.Ct. 1806 (1984).

For whatever time, from when compensation was due and owing to Petitioner to when it was actually paid, Petitioner is entitled to the full compensation for the full rights he gave up. Otherwise, Petitioner receives treatment unequal in law from those whose livelihood is not controlled by administrative agencies with the power to suspend the anti-trust and labor laws of the United States.

Second, the allowance of prejudgment interest in this instance would encourage parties situated similarly to the respondent Pan Am to settle those claims against them at a time when in all good faith they should have done so, especially in labor matters.

The primary rationale underlying court rules or statutes mandating the award of prejudgment interest is to encourage settlements, recognizing that in most civil cases there are no real incentives to pretrial disposition actions. It is indeed cases such as this that demonstrate to defendants, that it is to their economic advantage to delay payments.

The NLRB in accordance with these principles has held:

> . . . a statutory obligation in the nature of a debt bears interests even though the statute creating the obligation fails to provide for it . . . Statutory obligations may bear interest even though the statute makes no provision for it Interest on such obligations is or is not payable depending upon the purpose of the statutory enactment and upon principles of equity. The obligation is in the nature of a debt it is deemed interest-bearing, because the statutory purpose was to create a debtor-creditor relationship and in equity interest is allowed as a means of compensating a creditor for loss of use of his money, 138 NLRB 97, 51 LRR, 1123-24 (footnotes omitted)

The CAB, having no experience in labor matters, should have followed the NLRB's precedent and allowed the prejudgment interest, since but for the CAB's imposition of the LPP's the Petitioners would have had access to redress their grievances under the full panoply of the NLRB's rules, policies and precedents.

Third, a possible conflict exists in regards to the award of prejudgment interest. *Eastern Airlines v. Mahford* 83-1807. In that case, as in this, a mechanism for rapid resolution of disputes was devised. Defendants who waited five years before payment to plaintiffs were taxed prejudgment interest. Petitioners respectfully submit that this was correct.

ISSUE I

THE CAB'S CONCLUSION THAT PREJUDGMENT INTEREST IS NOT ALLOWABLE BASED UPON THE FACT THAT THE LPPs DO NOT CONTAIN AN EXPRESS PREJUDGMENT INTEREST PROVISION AND THAT AN AWARD OF PREJUDGMENT INTEREST WOULD "AMEND" THE LPPs IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION OR OTHERWISE NOT IN ACCORDANCE WITH THE LAW.

"Prejudgment interest" is compensation "allowed by law as additonal damages for loss of use of the money due as damages during the lapse of time since the accrual of the claim". McCormick on Damages Sec. 5 (1935).

In the instant case Sec. 12(a) of the LPPs states:

> Section 12(a). In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by

> the parties within 20 days after the controversy arises, it may referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if unrepresented, the employee or employees, or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

Section 12(a) of the LPP's clearly requires that an extension of time be agreed to by *all* parties. In this case, there was never such an agreement reached between all parties.

A growing number of states have adopted Court rules, court decisions, or statutes mandating prejudgment interest. This Court has long approved prejudgment interest while sitting in Armiralty.[1]

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[1]See The President Madison, 91 F2d 835, (9th Cir. 1937). *Accord Cargill, Inc. v. Taylor Towing Serv., Inc.*, 642 F.2d 239, 241-42 (8th Cir. 1981); *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 823 (2d Cir, 1981); *O'Connell Transp. Co. v. City of*

Both the CAB and the Eleventh Circuit overstated the importance of the issue of the liquidated/unliquidated nature of the claim. Prejudgment interest is based on the unjust utilization of the money by Pan American. While the early common law views any interest as sinful, this concept apparently arose from Biblical comments, with the expansion of commercial activity courts and commentators have come to view interest as nothing more than the natural growth of money. See *Rothschild, Prejudgment Interest Survey and Suggestion*, 77 Nw.L.Rev. 192 (1982).

This Court, last term in *Dickman v. Commissioner*, 79 104 S.Ct. 1086, 79 Led 2d 343 (1984) stated that a taxpayer who has the use of money has a valuable right:

> The right to the use of $100,000, without charge is a valuable interest in the money lent, as much so as the rentfree use of property consisting of land and buildings. In either case, there is a measurable economic value associated with the use of the property transferred. The value of the use of money is found in what it can produce; the measure of that value is interest—"rent" for the use of the funds.
>
> The right to use money is plainly a valuable right, readily measurable by reference to current

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(Footnote 1 Continued)

New York, 215 F.2d 92, 95 (2d Cir. 1954); *Ore Carriers of Liberia, Inc. v. Navigen Co.*, 305 F. Supp. 895, 896 (S.D.N.Y. 1969), aff'd, 435 F.2d 549 (2nd Cir. 1970) See also *Thompson Towing & Wrecking Assoc. v. McGregor*, 207 F. 299, 221 (6th Cir. 1913).

interest rates; the vast banking industry is positive evidence of this reality. 79 L.Ed 2 at 350.

This Court has further recognized the use of money is a valuable right in *Miller v. Robinson* 266 U.S. 243, 258 (1924), *Frankhouse v. Preston Co.*, 290 U.S. 163, 168, 189, 1933 and *Social Security Board v. Nieiotko* 327 U.S. 358, 369 (1945).

Banks' request for prejudgment interest is based upon the basic principle that where one party retains the use of money which ought to have been paid to another, the first party is unjustly enriched because he gets the benefits that result from its use and the other party is damaged because he has lost those benefits. See, *Laycock v. Parker*, 103 Wis, 161, 79 N.W. 327 (1899), Restatement of Law of Restitution, Sec. 156, comment by (American Law Institute 1937), *Baeten v. Van Ess*, 474 F.Supp. 1324 (E. D. Wis, 1979), *Fattore Co., Inc. v. Metropolitan Sewage Commission*, 505 F.2d 1 (7th Cir. 1974), *Essex House v. St. Paul Fire and Marine Ins. Co.*, 404 F.Supp. 978, 995, (S. D. Ohio 1975), *Hodgson v. American Can Co.*, 440 F.2d 916, 922 (8th Cir. 1971).

In its Order denying interest the Board found that "the LPP's on their face do not impose a requirement to pay prejudgment interest on the carrier." Since no party has contended that there is an express interest provision in the LPPs, this finding is apparently based upon the Banks contention that the "equivalency" provision in Section 4(a) of the LPPs is sufficiently broad to form the basis for an interest award and Pan

Am's response attempting to narrow that contention to a claim that the LPPs implicitly require the payment of prejudgment interest. The Board accepted Pan Am's argument that "(s)ince Section 4(a) does not implicitly provide for the payment of interest, the interest award requested by the Bank's Claimants necessarily would involve a de facto retroactive modification of the LPPs."

The Board's conclusion shows both a basic misinterpretation of the law of contracts and damages, and a failure to distinguish between the concepts of conventional interest and prejudgment interest. Conventional interest is interest which arises out of a contract between parties, express or implied, whereas prejudgment interest is interest allowed as a part of damages for breach of that contract.

> Interest by way of damages has been defined as interest allowed in actions for breach of contract or tort for the unlawful detention of money found to be due. This type of interest is frequently called "moratory interest." Interest, as a part of damages, is allowed, not by application of arbitrary rules, but as a result of the justice of the individual case and as compensation to the injured party.
>
> A distinction exists between interest provided for by the terms of a contract to be paid before its breach and interest recoverable by way of damages after a breach, although the term "interest" is often used indiscriminately to describe both amounts. Contractual interests is the creature of contact and is recoverable only as provided by its terms. When the

> agreement, however, is once violated, the nondefaulting party has sustained a wrong for which the law gives him redress by way of damages, including in many cases, interest for retention of the funds due on breach. Furthermore, it has been held that a contract for interest ceases at maturity, in the absence of a provision to the contrary, and thereafter interest is allowed as damages.
>
> 22 Am. Jur 2d, Damages, Section 179, pp. 256-257 (footnotes omitted).

Thus, when the Board found that the LPPs on their face did not impose a prejudgment interest requirement and concluded that an award of interest would necessarily "amend" the LPPs, it applied the law relating to conventional interest to a request for prejudgment interest, and therefore failed to deal with the issue presented.

The LPPs were imposed by CAB order as a condition to approval of the Agreement. Pan Am and TWA, by accepting the Agreement, were bound by that condition. The very purpose of the LPPs is to compensate individual employees discharged as a result of the Agreement beginning with the date of their dismissal and continuing through their individual benefit period. The LPPs by their terms require monthly payments each and every month during the benefit period to any employee found entitled to LPP benefits. The Company, by failing to pay LPPs as required, breached the Agreement (and thereby the Board's Order), and what was previously a contractual obligation to pay dismissal allowances became damages for breach of contract. Banks contends that

under applicable Federal law those damages must include interest on the sums due, and from the date due. The Board has the undisputed authority and duty to oversee LPP claims and this authority has specifically been upheld by the courts.

The Board's finding that the LPPs do not on their face require payments of "prejudgment interest" is wholly irrelevant to the issue before the Board of whether or not Pan Am should be required to pay prejudgment interest based upon its breach of the Agreement to pay dismissal allowances.

Even if the Board regards Banks prejudgment interest request as a request for "retroactive amendment" of the LPPs, its denial based upon its "retroactive amendment" holding is arbitrary and capricious in light of its prior treatment of retroactive amendments and is, therefore, an abuse of discretion.

Petitioners further assert that the unacceptable delays have reached Constitutional magnitude. Here the respondent Pan Am, the Arbitrator and the CAB took what was to be, an "expedited procedure" and allowed for undue delays. This question is before this Court in a similar matter, *Eastern Air Lines v. Mahfoud* 83-1807 (set for reargument in the October term). The agreement for the route swap was made as an exception to the Anti-Trust laws of the United States, as a result of which Pan Am received a benefit in excess of $125,000,000. Until 1983 Pan Am resisted every attempt to require payment of the LPPs. Petitioners contend that under the express terms of the LPPs 12(a) they were entitled to interest from the 110th day (20 + 90 days) from when the dispute arose (their date of furlough)

until the date of payment. Petitioners contend that allowing Pan Am to retain Petitioners money is a "taking" within the meaning of the Fifth Amendment to the Constitution of the United States. These Petitioners have been deprived of property (money) that they were entitled to and Pan Am has been "unjustly enriched" as a result of Pan Am's retainment of Petitioners funds.

Prejudgment interest not only achieves the goal of full compensation of the victim, but would also have the effect of clearing congested court calendars. See, *Rothschild, Supra*, p.p. 222.

ISSUE TWO:

WHETHER THE CAB SHOULD HAVE DEFERRED TO NLRB POLICY IN THE AWARD OF PREJUDGMENT INTEREST AND WHETHER ITS FAILURE TO DO SO IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION OR OTHERWISE NOT IN ACCORDANCE WITH THE LAW

The CAB has no independent labor policy. As the CAB itself pointed out in *Universal Airlines, Acquisition of American Flyers*, 58 C.A.B. 1, 5 (1971) the Board itself " . . . possesses no expertise in labor matters", therefore it has no basis upon which to formulate such policy. See, *American Airlines v. C.A.B.*, 445 F.2d 891 (2d Cir. 1971). Notwithstanding its lack of labor expertise the Board undertook, in this case, to independently formulate its policy with respect to prejudgment interest. In formulating its policy, the Board completely disregarded the massive and persuasive body of law, squarely on point, generated by the National Labor Relations Board

in its decision under the National Labor Relations Act, 29 U.S.C. 150 *et seq*, (NLRA) and approved by the Courts in numerous decisions.

In his Memorandum Rankin pointed to the NLRB's policy of awarding prejudgment interest on its backpay awards and asked that the CAB adopt this practice as "entirely consistent with the purposes of the LPPs." The NLRB first awarded interest in *Isis Plumbing and Heating Co.*—Decision of NLRB, 138 NLRB 716, 51 LRR, 1122 (1962) (Isis), wherein it rejected the respondents' claim that NLRA's silence on the question of interest reflected any intent on the part of Congress that interest on backpay awards would be improper and awarded prejudgment interest at the rate of 6%. The NLRB, citing *Rodgers v. United States*, 332 U.S. 371 (1947) (Rodgers), and *United States v. Union Drill and Tool*, 183 F.2d 998 (D.C. Cir. 1950) (Union Drill), and other cases held:

> As our prior cases show, a persuasive consideration in determining whether such obligation shall bear interest is the relative equities between and beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic principle that one for whose financial advantage an obligation was assured or enforced, and who has suffered actual money damaged by another's breach of that obligation, should be fairly compensated for the loss thereby sustained . . .

. . . a statutory obligation in the nature of a debt bears interest even though the statute creating the obligation fails to provide for it . . . Statutory obligations may bear interest even though the statute makes no provision for it. Interest on such obligations is or is not payable depending upon the purpose of the statutory enactment and upon principles of equity. If the obligation is in the nature of a debt, it is deemed interest-bearing, because the statutory purpose was to create a debtor-creditor relationship and in equity interest is allowed as a means of compensating a creditor for loss of use of his money.

"Backpay" granted to an employee under the Act is considered as wages lost by the employee as the result of the respondent's wrong. It is not a fine or penalty imposed on the respondent by the Board. It is an indebtedness arising out of an obligation imposed by Statute—an incident fixed by law to the employer-employee relationship. A liability based on quasi-contract . . . The United States collected the backpay for the benefit of the discriminatees.

Accordingly, under accepted legal and equitable principles, interest should be added to backpay awards made to employees who have been discriminatorily separated from their employment. In this connection, it is immaterial that the final sum due such an employee can only be ascertained after considering such factors

as the interim earnings of discriminatees and the possible willful incurrence of wage losses.

138 NLRB 97, 51 LRRM 1123-24 (footnotes omitted)

Later, in *Florida Steel Corp.* — Decision of NLRB, 231 NLRB 652, 96 LRR, 1071 (1977), the Board abandoned its use of the flat 6% rate of interest used in Isis and adopted the use of the IRS "adjusted prime rate" in computing backpay awards confirming that "(t)he purpose of prejudgment interest is to compensate the (employee) for the loss of use of his money." Pan Am, in its Answer, failed to directly address Banks arguments attempting instead to challenge the Board's basic authority to award prejudgment interest under any circumstances. It was in the context of this challenge that Pan Am argued that differences between an employer's unlawful discharges under the NLRA and Pan Am's failure to pay LPPs imposed by CAB order prohibited the Board's awarding prejudgment interest. Both parties expounded upon these arguments in subsequent pleadings.

After rejecting Pan Am's arguments as negating its authority to award prejudgment interest, the Board then adopted those arguments to support its denial of the claim anyway, concluding that the NLRB's backpay awards compensate employees for an employer's violation of Federal labor law, whereas dismissal allowance payments do not result from any violation of law by the carrier.

The Board's conclusion to deny prejudgment interest on this basis is wrong as a matter of law in that it is based upon whether or not the employee's discharge

resulted from the employer's violation of any law and that inquiry is simply irrelevant to the question of whether or not the employee, once discharged, should receive prejudgment interest on the past due backpay. In both the NLRB cases and the instant LPP case, the right to receive backpay is founded on Federal statutory law and Federal common law, therefore Federal law applicable to payment of prejudgment interest as set forth in *Rodgers*, *Union Drill* and *Isis* should apply. Courts also grant prejudgment interest awards for a variety of backpay awards. *Davis v. Jobs for Progress, Inc.*, 427 F.Supp. 479 (D.C. Cir. 1976) (sex discrimination); *EEOC v. Local 2P Lithographers & Photoengravers, I.V.*, 412 F.Supp. 530 (D. Md. 1975) (discrimination); *EEOC v. Liberty Mutual Insurance Co.*, 346 F.Supp. 675 (N.D. Ga. 1972) *aff'd* 475 F.2d 579 (5th Cir. 1973) (discrimination); *Hadra v. Herman Blum Consulting Engineers*, 682 F.2d 1242 (5th Cir. 1980) (wrongful discharge); *Hawkins v. Anhauser-Busch, Inc.*, 522 F.Supp. 159 (E.D. Missouri 1981) (sex discrimination); *Gonzalez v. Markle Mfg. Co.*, 487 F.Supp. 1088 (W.D. Texas 1980) (discrimination); *Simpson v. Norwesco, Inc.*, 583 F.2d 1007 (8th Cir. 1978) (breach of contract); and, *Hyde v. Land-of-Sky Regional Council*, 572 F.2d 988 (4th Cir. 1978) (wrongful discharge). The courts have similarly granted prejudgment interest awards for other employment related compensatory awards. *Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977) (trust obligation); *Kiser v. Huge*, 517 F.2d 1237 (D.C. Cir. 1974) (pension plan payments): *Clinchfield Coal Co. v. Cox*, 611 F.2d 47 (4th Cir. 1979) (black lung benefits); and, *Accardi v. Pennsylvania, R.R. Co.*, 369 F.2d 805 (2nd Cir. 1966) (separation allowances).

These interest awards are granted to make the Plaintiff whole to the amounts due them. *Accord, Royce, Gurley v. Export Drum, Inc.*, 466 F.2d 498, (5th Cir. 1977), *Royce Chemical vs. Sharpley*, 285 F.2d (5th Cir. 1960); and, *Commercial Standard Insurance Co. v. Boyce Street Apts.*, 703 F.2d 904 (5th Cir. 1983).

This is particularly true where the issue, in either case, is not whether the employee is entitled to backpay, but whether he should receive prejudgment interest on that backpay. The distinction that one employer refused to pay backpay because he wrongfully discharged an employee in violation of Federal labor law and the other where an employer discharges an employee and refuses to pay allowances in violation of a CAB Order is totally academic.[1]

If anything, the argument for prejudgment interest is even more compelling in the instant case of the Pan Am LPP recipient because his loss results directly from his discharge pursuant to Pan Am's highly anti-competitive market sharing agreement with TWA which, but for the CAB's power to exempt the Agreement from the operation of Federal antitrust laws, would have entitled the employee to treble damages for the loss of his job. In reaching its decision to exempt the Agreement from the antitrust laws, the Board conducted its public interest inquiry under the FAA and imposed LPPs in the Agreement to accomplish its purpose of assuring the stability of Pan Am's operations. Despite

[1]Petitioners only contend they are entitled to "prejudgment interest" for 110 days from their furlough (layoff) until they were paid their LPP Benefits.

widespread dismissals (contrary to Pan Am's assurances to the Board), the affected employees did not cause labor problems when Pan Am implemented the Agreement, but instead, chose to rely on the Board's LPP guarantees. In order 77-1-7 approving the Agreement, the Board stated its purpose in imposing LPPs in the Agreement as " . . . to ease the burdens on employees from implementation of (the) agreement and thereby avoid industrial strife" (citations omitted, emphasis added). 72 CAB 114 Since Pan Am did not pay the LPPs during the claim period following dismissals as required, and has paid the claims seven years later in vastly deflated dollars, it has neither "eased the burdens on employees"[2] dismissed nor paid the required compensation when the effect of time on money is considered. An award of prejudgment interest now will only partially correct this grave injustice and violation of U.S. labor policy.

The Board's refusal to follow NLRB policy is arbitrary and capricious, is contrary to the law of Federal labor policy and therefore, an abuse of its discretion.

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[2]See also *Universal Airline, Acquisition of American Flyers*, 58 C.A.B. 1.16 (1971).

ISSUE III.

THERE EXISTS A CONFLICT WITHIN THE CIRCUITS ON THE ISSUE OF THE PAYMENT OF PREJUDGMENT INTEREST IN NONADMIRALTY FEDERAL QUESTIONS.

Presently this Court is in the process of deciding *Eastern Airlines v. Mahfoud*, 83-1807 in which the Fifth Circuit Court of Appeals held prejudgment interest applicable. That case is in conflict with *O'Rourke v. Eastern Airlines*, 730 F2d. 842 (Ca 2nd 1984) Petitioner respectfully requests that certiorari be granted until the conflict regarding prejudgment interest is addressed.

CONCLUSION

The issues presented by the Petitioners here today are important ones. For the Petitioners themselves it represents a simple recovery of the compensation due to them under the intricate plans and policies of the CAB. This court's decision, however, if Certiorari is granted, will have its greatest impact in the clear realization and mandate that fundamental fairness compels that the time-value of money not be ignored when the compensation of an individual wronged is statutorily required, pursuant to national labor policy. That realization, would finally make it economically unprofitable for Defendants throughout the Judicial system to delay and prolong protracted litigation. Abusing every procedural right obtainable, in the knowledge that in the end their manoeuvres will reap them profits in the final balance. Only by negating the profitability of that final balance, can the aim of full and true compensation be achieved.

For these reasons, this Court should grant Certiorari.

Respectfully submitted,

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Appendix

R. BANKS, et al.,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., and Civil Aeronautics Board,

Respondents.

No. 84-5117.

United States Court of Appeals,
Eleventh Circuit.

June 25, 1985.

Flight engineers furloughed by airline sought review of Civil Aeronautics Board order refusing prejudgment interest on dismissal allowances awarded under labor protective provisions imposed as condition of Board's approval of airlines' route transfer and suspension agreement. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, sitting by designation, held that Board's action was neither arbitrary nor capricious, notwithstanding seven-year delay in payment.

Affirmed.

Interest—39(2)

Civil Aeronautics Board did not act arbitrarily or capriciously in refusing to grant prejudgment interest on dismissal allowances awarded airline's furloughed flight engineers under labor protective provisions imposed by the Board as condition of approval of route transfer and suspension agreement between employing air carrier and another where the LPPs on their face did not

provide for award of interest and no statute or judicial decision mandated such award, carrier was not found to have unreasonably delayed payment of dismissal allowances and claims were unliquidated, notwithstanding seven-year delay in payment.

Petition for Review of an Order of the Civil Aeronautics Board.

Before FAY and ANDERSON, Circuit Judges, and GIBSON*, Senior Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge:

Petitioners are a group of flight engineers furloughed by respondent Pan American World Airways, Inc. ("Pan Am") in 1976 as the result of a Route Transfer and Suspension Agreement ("Agreement") between Pan Am and Trans World Airlines, Inc. ("TWA"). They contend that the Civil Aeronautics Board ("CAB" or "Board")[1] erred in refusing to grant prejudgment interest on the dismissal allowances awarded them under the Labor Protective Provisions ("LPPs"), imposed by the Board as a condition of its approval of the Agreement. Because we conclude that the denial of prejudgment interest

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*Honorable Floyd R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

[1]The Civil Aeronautics Board ceased to exist on December 31, 1984. The Department of Transportation has assumed the duties of the Board with respect to the issues at hand in this matter.

was neither arbitrary nor capricious, we affirm the order of the Board.

I. Background.

To alleviate severe financial problems in 1975, Pan Am and TWA entered the Agreement, which called for each carrier to suspend operations on certain major worldwide routes, thereby leaving the other as the only United States carrier on those routes. Because the Federal Aviation Act, 49 U.S.C. §1378(b), at that time required prior CAB approval of any suspension of service by U.S. carriers, the Agreement was submitted to the CAB for approval and exemption under the anti-trust laws. After granting its approval, the Board issued supplemental Order 75-4-4 (April 1, 1985), imposing LPPs on Pan Am and TWA.[2] In imposing the LPPs, the Board stated that the provisions were necessary to promote the stability and efficiency of the air transportation system. Order 75-4-4 at 7.

Under Section 4(a) of the LPPs, an employee is entitled to a dismissal allowance if he loses his job as a result of the Agreement. In 1976 and 1977 Pan Am furloughed 418 of its flight engineers, most of whom claimed dismissal allowances under the LPPs. Pan Am denied the claims but agreed to arbitrate the matter. The arbitration hearing, originally scheduled for July

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[2]The United States Court of Appeals for the District of Columbia vacated the Board's approval of the Agreement, because of the Board's failure to hold a formal hearing, in *Northwest Airlines, Inc. v. C.A.B.*, 539 F.2d 748 (D.C.Cir. 1976). After conducting hearings the Board again approved the Agreement, subject once again to the LPPs, in Order 77-1-7 (November 16, 1976).

1976, was postponed for 19 months pending the Board's decision on another route exchange agreement involvng Pan Am. After the hearings the arbitrator ruled in 1979 that 171 flight engineers lost their jobs because of the route swap. In 1981 the arbitrator determined which of the original claimants were entitled to the allowances; that is, which claimants were furloughed because of the route exchange.

The claimants then asserted that they were entitled to interest on their dismissal allowances from the date they became eligible for those benefits. In response, the Arbitrator stated in his Scope Opinion of March 24, 1982 that because Section 4 of the LPPs did not authorize an award of interest, he was without jurisdiction to consider the issue. A number of successful claimants, the "Rankin group," submitted the interest issue to the Board for its consideration. The Board denied the interest claim in Order 83-8-51 (August 10, 1983), citing as its reasons the lack of authority within the terms of the LPPs or the case law for an award of prejudgment interest; the unliquidated nature of the claims; the inapplicability of NLRB decisions awarding interest; and the length of time the claimants waited before asserting a right to interest, thereby depriving Pan Am of notice that its obligations might be increased by millions of dollars. Upon petition by the Rankin group, the Board denied reconsideration in Order 83-12-29 (December 28, 1983). Petitioners here, the "Banks group," composed largely of the same group of flight engineers as the Rankin group, seek reversal of the Board Order denying interest.

II. Standard of Review.

In reviewing an order of the CAB, we must grant deference to the decision of the Board. Under 5 U.S.C. §706, we cannot under the issue here presented set aside the Board's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *." *See also Tiger International v. C.A.B.*, 554 F.2d 926, 935-37 (9th Cir.), *cert. denied*, 434 U.S. 975, 98 S.Ct. 532, 54 L.Ed.2d 467 (1977).

On consideration of the Board's denial of petitioners' claim to prejudgment interest, we find the Board's action neither arbitrary nor capricious. Whether an award of prejudgment interest was appropriate under the circumstances here was a legal question within the competency of the Board. The Board correctly noted that the LPPs on their face do not provide for an award of interest, and that no statute or judicial decision mandates such an award. Also, as the Board noted, it is not bound by the decisions of the NLRB awarding prejudgment interest in backpay cases. The NLRB's award of interest in backpay cases is intended to compensate employees injured by an employer's violation of federal labor relations law; LPP dismissal allowances, however, are intended to preserve the stability of the air transportion system. *See Wallace v. C.A.B.*, 755 F.2d 861, 864-65 (11th Cir. 1985) (noting that the CAB is free to reject any aspect of the national labor policy for any rational reason; the CAB's major concern is the regulation of the airline industry, not the promotion of any specific labor policy). Further, the CAB itself developed the LPPs, and "has the best understanding of what those provisions are supposed to mean." *Id.* As the Board noted in denying petitioners' claim of interest,

"If the Board had intended to impose as substantial a requirement as [the payment of prejudgment interest], we would have expressly said so." Order 83-8-51 at 16.

We recognize petitioners' argument that Pan Am benefited from the use of the money that petitioners were entitled to under the LPPs for the seven years that the arbitration process lasted. The Board, however, gave full and fair consideration to all of petitioners' arguments in support of an award of interest, and reasonably concluded that such an award was not appropriate under the circumstances. Had the Board found that Pan Am had unreasonably delayed payment of the dismissal allowances, it would have been presented with a different situation. The Board specifically found, however, that Pan Am had not acted unreasonably, and that the claims were unliquidated because Pan Am could not have known how many and which flight engineers were entitled to allowances until the arbitrator determined those issues.

In sum, because the Board's conduct was neither arbitrary nor capricious, we affirm the Order denying prejudgment interest on the dismissal allowances.

AFFIRMED.

[SERVED JAN 3 1984]

Order 83-12-129

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, DC.,
on the 28th day of December, 1983

Docket 27114

In the matter of
PAN AMERICAN-TRANS WORLD
AIRLINES ROUTE EXCHANGE AGREEMENT

Motion of Rankin, *et al.*, to set
aside arbitration awards and for
other relief under the labor
protective provisions

ORDER ON RECONSIDERATION

The Board imposed labor protective provisions (LPP's) as a condition to our approval of the route exchange agreement between Pan American World Airways and Trans World Airlines. The LPP's obligated Pan American to pay dismissal allowances to those employees who lost their jobs as a result of the route swap. After hearings, an arbitrator determined that 171 flight engineers were entitled to such dismissal allowances and made a series of rulings concerning the calculation of the allowances and the extent of the

claimants' rights. The claimants asked the Board to review several of the arbitrator's decisions. Our order ruling on their request, Order 83-8-51 (August 10, 1983), held, *inter alia*, that the flight engineers were not entitled to interest on the allowance payments. One group of claimants, the Rankin group, now seeks reconsideration of that holding. Pan American has filed an answer asking that reconsideration be denied.[1]

After considering the pleadings we see no error in our earlier decision, so we will deny reconsideration.

After Pan American implemented the route swap, it furloughed over 400 flight engineers, almost all of whom filed dismissal allowance claims against the carrier. Pan American agreed to arbitrate those claims. The arbitration hearing, originally scheduled for July 1976, was postponed for 19 months by the parties' agreement pending the Board's decision on another route exchange agreement. After the hearing, the arbitrator ruled in 1979 that 171 flight engineers lost their jobs because of the route swap. In 1981 he determined which of the original 400 claimants were the ones entitled to the allowances. Several rulings on a number of disputes involving the scope of the proceeding and the method of calculating the allowances then followed.

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[1]Pan American's answer also states that it has made full payment to 98 of the 118 claimants who have submitted their claims and supporting information to the carrier and partial payment to several other claimants. The other claims are being processed or arbitrated. We regret that the flight engineers did not receive their allowances much earlier, and we are pleased to see that their claims are finally being paid.

The Rankin group of 90 flight engineers asked the Board to reverse two of the arbitrator's rulings, one on the scope of the arbitration proceeding and one interpreting an LPP clause. These claimants also requested certain relief against Pan American to counteract its alleged willful delay of the case. The Rankin group contended that the claimants should be awarded interest on both their dismissal allowances and their claims to fringe benefits and lump sum payments, the interest to run from the time that the claimants became eligible for the payments. The Flight Engineers International Association, Pan Am chapter, largely supported the Rankin group's petition on behalf of the 27 claimants represented by the union. Pan American opposed the petition.

We determined in Order 83-8-51 (August 10, 1983) to deny the petition. In denying the claimants' request for interest, we noted that the LPP's by their terms do not require the carrier to pay interest and that no one had ever construed them before as imposing such an obligation on a carrier. In this case, moreover, the arbitrator ruled that section 4, the section governing dismissal allowances, did not entitle the claimants to interest. Although we sympathized with the flight engineers' position, we held that we appeared to have no authority to retroactively amend the LPP's to impose a multi-million dollar obligation to pay interest on Pan American. While the Rankin group had contended that the courts ordinarily award prejudgment interest, our review of the law indicated that such awards were not automatic. Courts used their discretion in some kinds of cases to deny interest, and some courts also followed the traditional rule that prejudgment interest could be awarded only on liquidated claims, *i.e.*, claims whose

amount can be determined by the parties without a court judgment even if the parties disagree over the validity of the claim In addition, we declined to follow the National Labor Relations Board's policy of including interest in its backpay awards, for we noted that the dismissal allowances, unlike Labor Board backpay awards, were not established to make the employee whole (or as an employee welfare measure), but to assist in maintaining the stability of the air transportation system.

The Rankin group seeks reconsideration only of our decision that the claimants are not entitled to interest. The Rankin group challenges our reasoning on a number of points but does not dispute our conclusion that an award of interest would amount to a retroactive amendment of the LPP's. The Rankin group also does not argue that we erred in holding that we had no apparent authority to make such an amendment which would impose a substantial liability on Pan American. We based our holding in part on the court's reasoning in *Western Air Lines v. CAB*, 194 F.2d 211 (9th Cir., 1952). The Rankin group has cited no case rebutting the reasoning of that case. Instead, the Rankin group argues that the courts routinely require defendants to pay prejudgment interest and that Federal labor policy, as announced by the Labor Board, calls for an interest award here. We find these arguments unpersuasive on the facts of this case.

The Rankin group states that interest awards are based on "the retention and use of monies by one party and the later determination that that party had an obligation to pay those monies to a claimant at some earlier point in time." Since the Rankin group asserts that it has established these facts, it believes the claimants

here are necessarily entitled to interest (Petition, p. 2). The claimants' position, however, overlooks the fact that the Board has never required a carrier to pay interest on an LPP claim and could not do so retroactively against Pan American. Furthermore, the courts do not routinely award prejudgment interest. As we noted before, some courts do not award interest when, as here, the underlying amount is not liquidated, and in other cases the courts have—and use—the discretion to deny prejudgment interest. Order 83-8-51, pp. 18-19.[2] While the Rankin group asserts that the distinction between liquidated and unliquidated damages is "virtually defunct," we note that a number of jurisdictions continue to use it. See, *e.g.*, *Fidelity Savings and Loan Ass'n v. Aetna Life and Casualty Co.*, 647 F.2d 933, 937 (9th Cir., 1981); *Coiffe v. Morris*, 676 F.2d 539, 543 (11th Cir., 1982); and the cases cited in Order 83-8-51 at p. 18.

On the basis of the Labor Board's practice of including prejudgment interest in its backpay awards, the Rankin group asserts that national labor policy requires the award of interest on LPP claims. We do not agree. The Labor Board's practice on the interest issue has not

[2]While the Rankin group argues that the flight engineers' claims were liquidated, we do not agree. Among other things, no one knew how many and which flight engineers were entitled to allowances until the arbitrator issued his awards on those issues, and thereafter the calculation of the amount owed each employee depended on the arbitrator's resolution of a number of contested issues involving the computation of the allowances. The amount of each employee's benefits also depended on the amount of his outside earnings. These unsettled issues would be enough to make the amount in dispute unliquidated. See, *e.g.*, *Fidelity Savings and Loan Ass'n v. Aetna Life and Casualty Co.*, 647 F.2d 933, 937 (9th Cir. 1981).

established any national policy. When that agency administers its own statute, it does not purport to determine how other agencies should administer different statutes, even when labor issues are involved. Furthermore, as we pointed out earlier, there are differences between the purposes of backpay awards and LPP dismissal allowances and between the nature of the events giving rise to the employer's obligation.

Finally, an award of interest here would create a burdensome obligation for Pan American long after it entered into the route swap. Indeed the Rankin group did not even begin to ask for an interest award until several years after Pan American agreed to arbitrate the flight engineers' claims. Furthermore, that proceeding was initially delayed for 19 months by the claimants' agreement. In these circumstances the grant of the Rankin group's request would be inequitable.

ACCORDINGLY, we deny the petition of A.M. Rankin, *et al.*, for reconsideration of Order 83-8-51.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)
All Members concurred.

[SERVED AUGUST 16, 1983]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 10th day of August, 1983

Docket 27114

In the matter of
PAN AMERICAN-TRANS WORLD
AIRLINES ROUTE EXCHANGE AGREEMENT
Motion of Rankin, *et al.*, to set
aside arbitration awards and for
other relief under the labor
protective provisions.

ORDER

When the Board approved the route exchange agreement ("route swap") between Pan American World Airways and Trans World Airlines, the Board imposed labor protective provisions (LPP's) on Pan American and TWA, Orders 75-1-133 (January 30, 1975) and 77-1-7 (November 16, 1976), reported at 72 CAB 1. Among other things, the LPP's required Pan American to pay dismissal allowances to employees who lost their jobs because of the route swap.

After the Board approved the route exchange agreement Pan American furloughed 418 of its flight engineers, most of whom claimed dismissal allowances

under the LPP's. Pan American and the flight engineer claimants agreed to hold an arbitration proceeding to resolve the claims. The arbitrator determined that 171 of the flight engineers are entitled to dismissal allowances, and Pan American has begun paying the allowances owed those employees.

However, there are a number of disputes remaining over the calculation of the allowances. Ninety of the flight engineers, the Rankin group, have filed a motion asking the Board to exercise its retained jurisdiction over the LPP's to (a) set aside two of the arbitrator's awards; (b) confirm the remaining awards; (c) require Pan American to pay interest on unpaid LPP benefits; (d) require Pan American to pay part of the claimant's costs and

* * *

The Rankin group also asks the Board to order Pan Am to provide an irrevocable letter of credit for $9.77 million "to guarantee payment of LPP claims up to that amount." Pan American opposes this request. We will not require Pan American to purchase a letter of credit or otherwise provide security for the payment of the claimant's allowances. We have no reason to believe that Pan American will be unable to pay the amounts due. We also are reluctant to give the flight engineers' claims preference over the carrier's other financial obligations.

Finally, we will deny the claimants' requests for an award of attorneys' fees and costs against Pan American. We have consistently denied such requests in the past. See, *e.g.*, Order 83-1-37 (January 12, 1983),

p. 6. Since the Rankin group has not shown that Pan American has acted in bad faith, there is no justification for departing from those precedents.

The Employees' Interest Claim

The Rankin group, supported by the Flight Engineers Association, contends that the claimants are entitled to interest on their dismissal allowances and on any section 5 and 6 claims made by the claimants. The interest should accrue from the time that the employees became entitled to the payments, not when the claims were made or when the arbitrator found them meritorious. The Rankin group argues that interest is required by the terms of the LPP's and that most courts include prejudgment interest in their damage awards. Pan American objects to any interest award on the grounds that it would amount to an unfair retroactive amendment of the LPP's, that the Board has no authority to award interest, and that the courts generally award prejudgment interest only when the amount of the defendant's liability was known before judgment or where the defendant's liability for damages resulted from bad faith conduct or conduct in violation of law.[10]

We conclude that we cannot impose an obligation to pay interest on Pan American in this case. First, we find that the LPP's by their terms do not require a carrier to pay prejudgment interest. In arguing the contrary, the Rankin group cites the language of section 4(a) providing that "[a]ny employee * * * deprived of

[10]The interest sought by the claimants is almost entirely prejudgment interest as it would apply to the period before the amount of each claim was fixed.

employment * * * shall be accorded a monthly allowance *equivalent* in each instance to 60 percent of the average monthly compensation of the employee * * * during the last 12 months of his employment" (emphasis added). As a result of inflation, $100 of today's money equals only $60 in 1976 money, according to the Rankin group. Thus the claimants will assertedly not receive the "equivalent" of their last compensation from Pan American unless the amount of their dismissal allowance is increased to offset inflation. The Rankin group contends that the award of prejudgment interest would enable the claimants to receive roughly the "equivalent" compensation guaranteed by the LPP's. Pan American argues that the LPP's by their terms do not entitle discharged employees to prejudgment interest. Among other things, Pan American notes that the arbitrator denied the claimants' interest request on the ground that section 4(a) of the LPP's did not authorize an award of interest (ruling of April 14, 1982).

We agree with Pan American that the LPP's on their face do not impose a requirement to pay prejudgment interest on the carrier. If the Board had intended to impose as substantial a requirement as that, we would have expressly said so. Our conclusion here is supported by the fact that the claimants themselves did not contend that the LPP's required prejudgment interest until long after this proceeding began. They have also cited no other LPP case where the Board or an arbitrator awarded such interest.

We note that the arbitrator also determined that section 4 did not require Pan American to pay interest. When the Rankin group argued to Kahn that the claimants

were entitled to interest, Kahn refused to consider the interest claim (April 14, 1982 award). He stated that,

> This LPP arbitration proceeding is 'limited to disputes relating to dismissal allowance entitlements under Section 4 * * *.' Claims for prejudgment and/or postjudgment interest do not fall within the scope of this limitation.

While we sympathize with the claimants' position, we doubt that we have the legal authority to amend the LPP's now to impose such an obligation on Pan American.[11] As Pan American points out, a similar question was addressed in *Western Air Lines v. CAB*, 194 F.2d 211 (9th Cir., 1952). In that case the Board had approved Western's sale to United Air Lines of Denver-Los Angeles certificate authority without imposing LPP's and later imposed LPP's retroactively. The Board took such action because its original decision was based on representations by the carrier which proved inaccurate only days after the Board's decision.

The Board's decision to impose LPP's was affirmed by the Court when Western challenged it. Western

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[11]We do not, however, agree with Pan American's argument that the Board has no authority to award prejudgment interest, an argument based on the alleged analogy of the Board's inability to award damages. *McQuade Tours*, 50 CAB 910, 912 (1969). If this analogy were as persuasive as Pan American claims, we would also be unable to oversee LPP claims for discharge and displacement allowances. Since we have the authority to require carriers to make payments of such allowances to employees, we would have the authority to include interest in the amounts owed by a carrier, if an interest award is otherwise proper.

argued that the Board could not approve a transaction as being in the public interest and "then later, after the [transaction's completion], impose onerous conditions which are as of that time necessarily mandatory on the carrier," 194 F.2d at 214. The Court agreed that this kind of argument "would have much force" in other circumstances but found that the circumstances in Western's case made the Board's action reasonable. Western had known that the Board's action was not final when it laid off its employees and that the Board's decision to deny LPP's was based on assurances that no one would be laid off. Thus Western "acted with its eyes open and at its own risk" (*ibid.*).[12]

Unlike Western, however, Pan American had no notice until several years after the route swap that anyone would seek to increase its obligations by adding a requirement to pay interest. We are reluctant to amend the LPP's to increase Pan American's liability by several million dollars so long after the carrier implemented the transactions approved by the Board. We are especially reluctant to do so here, for there are no signs in the record that Pan American has tried to unduly delay

[12]We believe that the *Western* case is more analogous to this proceeding than the case cited by the Rankin group, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). In *Chenery* the Court affirmed SEC orders which in effect required the recission of some past stock transactions. The agency took that action, however, in the course of considering applications for approval of corporate reorganizations, not by retroactively amending its own orders. Similarly, *Air Line Pilots Ass'n v. CAB*, 509 F.2d 964, 968 (D.C. Cir., 1975), concerned the Board's authority to renew its approval of an existing airline agreement on a new condition, not the retroactive imposition of conditions on a past transaction.

the completion of the proceeding. Moreover, the flight engineers are seeking interest on their section 5 and 6 claims even though no such claims were filed until well after this proceeding began.

The Rankin group, however, argued in their reply that an award of interest would be consistent with the prevailing judicial practice, for assertedly the courts generally include prejudgment interest in money judgments, even where the amount of the judgment was unliquidated (*i.e.*, where the amount owed by the defendant cannot be known until issuance of the court's judgment). While Pan American agrees that the courts award prejudgment interest more than they did traditionally, when such interest was rarely awarded, Pan American argues that prejudgment interest awards are still not the rule in unliquidated damage cases. Since the flight engineers' claims are not liquidated, Pan American contends that an award of interest here would be inappropriate.[13]

We believe that the relief requested by the claimants is not required by judicial precedent. Despite the Rankin

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[13]The Rankin group originally claimed that the Board should award interest because the amount of the flight engineers' claims was liquidated, and the courts invariably award interest where the amount of damages is liquidated. In its reply Pan American demonstrated that the employees' claims were not liquidated for, among other things, the parties could not even agree on how many flight engineers—and which flight engineers—were entitled to LPP benefits until the arbitrator resolved those issues. In its later pleadings, accordingly, the Rankin group abandoned its contention that interest should be awarded because the employees' claims were liquidated and instead argued the courts generally award prejudgment interest on liquidated and unliquidated claims.

group's current argument that prejudgment interest would be awarded by a court in this kind of case, we note that the Rankin group's original motion clearly stated that the courts usually do not award prejudgment interest unless the amount of damages is liquidated (Mem., pp. 33-35). The parties' pleadings have cited many cases applying the distinction between liquidated and unliquidated damages. See, *e.g.*, *Fattore Co. v. Metropolitan Sewerage Comm'n*, 505 F.2d 1 (7th Cir., 1974); *Laday v. Chicago, Milwaukee, St Paul and Pacific R.R.*, 422 F.2d 1168, 1172 (7th Cir., 1970). In other cases where interest may be awarded the courts may deny prejudgment interest in their discretion. See, *e.g.*, *Merriweather v. Hercules, Inc.*, 631 F.2d 1161, 1168 (5th Cir., 1980); *Taylor v. Philips Industries*, 593 F.2d 783, 787 (7th Cir., 1979); *NF&M Corp. v. United Steelworkers*, 390 F. Supp. 266, 270 (W.D. Pa.), *aff'd*, 524 F.2d 756 (3d Cir., 1975).

While the NLRB includes prejudgment interest in its backpay awards, this does not persuade us to grant the claimants here a right to interest. The Labor Board's backpay awards are intended to compensate employees injured by an employer's violation of Federal labor relations law. The dismissal payments provided by the LPP's, on the other hand, do not result from any violation of law by the carrier. In addition, the claimants have not shown that the Labor Board required employers to pay interest in a case like this, where the employer had no notice for years that it would be obligated to pay interest retroactively.

The Rankin group's interest claims are also based on a misconception of the dismissal allowance's purpose, for they assume that the payments are designed to

"make whole" the employee for the loss of the job. If true, that assumption would make this case much more like the damage award and backpay cases cited in support of the interest claim, where interest is awarded in order to fully compensate the plaintiff for his loss. The LPP dismissal allowances, however, are not intended to make the employees whole. As we said in considering Pan American's request for declaratory relief, Order 82-12-27 (December 9, 1982), p. 5: "The LPP's, after all, were not established as an employee welfare measure, but as a means of preserving the stability of the air transportation system in an era when new entry and competition were largely precluded by the Act." In view of the purpose of the LPP's (and the fact that they provide airline employees with benefits not ordinarily granted employees in other industries), we prefer not to retroactively amend them so as to improve the benefits received by the employees when, as here, doing so would impose a heavy burden on the carrier and there are no compelling equitable reasons for doing that.[14]

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[14]Our partial grant of Pan American's request for declaratory relief in Order 82-12-27 is consistent with our decision to deny the claimants' request for a retroactive amendment of the LPP's. First, Pan American filed its request for declaratory relief fairly soon after its review of the claimants' outside income reports suggested that some of the flight engineers may not have looked for new employment. Here, on the other hand, the claimants initially requested interest several years after they became aware that there would be a long delay before their claims were resolved (as noted above, part of the delay resulted from the claimants' agreement to postpone the start of the hearings before Kahn).

Secondly, our decision that the claimants had a duty to make reasonable efforts to find new employment was based on the implicit inclusion of such a requirement in the LPP's and the

Conclusion

While we have not found Pan American at fault for delaying the resolution of the flight engineers' claims, that process has taken far too long. We expect Pan American to use its best efforts to complete the process as soon as possible so that the claimants will receive the payments contemplated by the LPP's.

ACCORDINGLY, we deny the motion of Rankin, *et al.*, in Docket 27114, the *Pan American-Trans World Airlines Route Exchange Agreement* proceeding, to set aside two arbitration awards; to confirm the remaining arbitration awards; to order costs and atttorneys' fees; to order certain protective relief; to order expedited treatment of the motion, and for interest on unpaid labor protective provision compensation in accordance with our order.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)
All Members concurred.

(Footnote 14 Continued)
almost universal application of that kind of requirement to other situations where employees receive benefits for losing their jobs. The flight engineers also did not argue that the relief sought by Pan American would prejudice them, except for delaying the resolution of some claims.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 1st day of April, 1975

Docket 27114, *et al.*

Application of
PAN AMERICAN WORLD AIRWAYS, INC.
AND
TRANS WORLD AIRLINES, INC.
for approval of an agreement

ORDER ON RECONSIDERATION AND ON LABOR ISSUES

By Order 75-1-133, January 30, 1975, the Board granted various suspension and exemption requests and approved an agreement between Pan American World Airways and Trans World Airlines under which the carriers would eliminate duplicative services and make other adjustments to their Pacific and Transatlantic route systems in order to alleviate the severe and continuing financial problems in their international operations. The Board also held that on the basis of the record then before it that there was insufficient evidence to support (1) disapproval of the agreement and related applications on the basis of adverse labor impact, or (2) the imposition of labor protective provisions. Consequently, the Board provided an opportunity for interested parties to file further pleadings with respect to the question of the impact on the employees of Pan

American and TWA resulting from the implementation of the agreement, and of the financial impact on Pan American and TWA which may result from the imposition of labor protective provisions. We will address the petitions for reconsideration and the responses relating to labor impact separately below.[1]

* * *

have uniformly rejected to so-called labor protective guidelines similar to so-called those set forth in Order 71-12-45, since the priority-in hiring protection afforded by those guidelines is illusory at a time when carrier hiring is reduced. We are mindful of the suggestion of the TWA-MEC in its reply, that as an alternative to labor provisions the Board should consider allowing the parties a 7-day period in which to negotiate provisions suitable to all parties. In light of the positions taken by both carriers in opposition to Board-imposed labor provisions, we are doubtful that such an approach would have any practical effect other than delaying resolution of this issue. However, we would be amenable to modifying this order if the parties are able to get together and agree upon a different form of condition satisfactory to all concerned.

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[1]The Indianapolis Airport Authority filed an answer to the applications of Pan American and TWA together with a motion for leave to file an unauthorized document. The pleading was filed eleven days after the date answers were to be filed and in our view good cause has not been shown why Indianapolis or its counsel could not have met the filing date. Consequently, we will deny the motion. In any event, the matters raised regarding the need for hearings were dealt with adequately in Order 75-1-133. Indianapolis has not petitioned for reconsideration of those findings.

Finally, we find that a hearing on the matters raised is not necessary. Although there are conflicting factual assertions by the opposing factions, even if each presentation is held in a light most favorable to it, we find that the public interest requires the action we are taking herein.

ACCORDINGLY, IT IS ORDERED THAT:

1. The motion of the Indianapolis Airport Authority for leave to file an unauthorized document be and it hereby is denied;

2. The motion of the Air Line Pilots Association for leave to file an amended answer be and it hereby is granted;

3. The motions of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and the International Association of Machinists and Aerospace Workers be and they hereby are dismissed;

4. The petitions for reconsideration of National Airlines; The Flying Tiger Line; the City and Chamber of Commerce of Philadelphia; and the International Brotherhood of Teamsters be and they hereby are denied;

5. Amended Approved Service Plans-Foreign Air Transportation for routes 130 and 132 shall be issued to Pan American in the form attached hereto; and

6. It is just and reasonable, and in the public interest, to attach to the Board's approval in Order 75-1-133 of the agreement between Pan American and

TWA and the grant of exemption and suspension authority the following conditions:

> Pan American and TWA shall be subject to the labor protective provisions set forth in the Appendix: *Provided*, That jurisdiction is hereby retained to make such amendments, modifications, and additions to the labor protective provisions herein imposed as circumstances and the public interest may from time to time require: *Provided, further*, That jurisdiction is hereby retained for purposes of imposing if necessary, by subsequent order, such reporting requirements as may be appropriate in order to obtain data concerning, on the one hand, the extent to which affected employees are benefited by our imposition of labor protective provisions, and, on the other, the costs incurred by the carriers as a result of the labor protective provisions: and *Provided further*, application of the labor protective provisions shall be retroactive to the date on which the agreement approved by Order 75-1-133 was signed.

This order shall be published in the Federal Register.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

(SEAL)

Labor Protective Provisions

Section 1. The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by the implementation of agreement between Pan American World Airways and Trans World Airlines in Docket 27114 approved by Order 75-1-133, and it is the intent that such conditions are to be restricted to those changes in employment due to and resulting from such agreement. Fluctuations, rises and falls, and changes in volume or character of employment brought about by other causes are not covered by or intended to be covered by these provisions.

Section 2(a). The term "carrier" as used herein refers to either Pan American or TWA.

(b). The term "employee" as used herein shall mean an employee of the carriers other than a temporary or part-time employee.

(c). The term "agreement" as used herein shall mean except as otherwise indicated, the agreement between Pan American and TWA signed on December 17, 1974, and approved by the Board by Order 75-1-133, January 30, 1975.

Section 3(a). Subject to the applicable conditions set forth herein, no employee of either of the carriers involved in the agreement who is continued in service shall as a result of the agreement be placed in a worse position with respect to compensation than he occupied immediately prior to his displacement so long as he is unable in the normal exercise of his seniority rights

under existing agreements, rules, and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him immediately prior to such date, except, however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b). The protection afforded by the foregoing paragraph is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c). Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last 12 months in which he performed service immediately preceding the date of his displacement (such 12 months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee; and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less compensation for any time lost on

account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

(d). The protection afforded herein shall only apply to displacements occurring during the effective term of approval as set forth in Order 75-1-133, as may be amended by Board order, and occurring within a period of 3 years from the date on which the agreement was approved (referred to herein as the claim period); and the period during which this protection is to be given (referred to herein as the protective period) shall extend for a period of 4 years from the date on which the employee is displaced.

Section 4 (a). Any employee of either of the carriers participating in the agreement who is deprived of employment as a result of said agreement shall be accorded an allowance (hereinafter termed a "dismissal allowance"), based on length of service, which shall be a monthly allowance equivalent in each instance to 60 percent of the average monthly compensation of the employee in question during the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the agreement. This dismissal allowance will be made to each eligible employee, while unemployed, during a period beginning at the date he is first deprived of employment as a result of the agreement and extending

in each instance for a length of time determined and limited by the following schedule:

Length of service Years	Period of payment Months
1 and less than 2	6
2 and less than 3	12
3 and less than 5	18
5 and less than 10	36
10 and less than 15	48
15 and over	60

In the case of an employee with less than 1 year of service such employee shall not be covered by the benefits provided in this section, but shall receive such benefits, and only such benefits, as are provided by section 6.

(b). For the purpose of these provisions, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for 1 month's service for each month in which he performed any service (in any capacity whatsoever) and 12 such months shall be credited as 1 year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of the carrier: *Provided*, That in calculating the dismissal allowance for such an employee, such allowance

shall be based upon the compensation paid such employee by the carrier during his last 12 months of service on the company payroll and not on the compensation he may have been paid by the employee representative organization.

(c). An employee shall not be regarded as deprived of employment in case of his resignation, death, or retirement on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furlough because of reduction of forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of the agreement who is not deprived of his employment within 3 years from the effective date of said agreement.

(d). Each employee receiving a dismissal allowance shall keep his employer informed of his address and the name and address of any other person by whom he may be regularly employed.

(e). The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a dismissal allowance accordingly if any is due.

(f). An employee receiving a dismissal allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(g). If an employee who is receiving a dismissal allowance returns to service the dismissal allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, however, he shall be entitled to protection in accordance with the provisions of section 3.

(h). If an employee who is receiving a dismissal allowance obtains other employment, his dismissal allowance shall be reduced to the extent that the sum total of his earnings in such employment plus his allowance and any unemployment insurance benefit (or similar benefit) exceed the amount upon which his dismissal allowance is based: *Provided*, That this shall not apply to employees with less than 1 year's service.

(i). A dismissal allowance shall cease prior to the expiration of its prescribed period in the event of—

1. Failure without good cause to return to service after being notified of a position for which he is eligible and as provided in paragraphs (f) and (g).

2. Resignation.

3. Death.

4. Retirement or on account of age or disability in accordance with the current rules and practices applicable to employees generally.

5. Dismissal for justifiable cause.

Section 5. An employee affected by the agreement shall not during the applicable protective period be deprived of benefits attaching to his previous employment, such as hospitalization, relief, and the like.

Section 6. Any employee eligible to receive a dismissal allowance under section 4 hereof may, at his option, resign and (in lieu of all other benefits and protections provided in these provisions) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of service Year	Separation allowance Months' pay
1 and less than 2	3
2 and less than 3	6
3 and less than 5	9
5 and over	12

In the case of employees with less than 1 year's service, 5 days' pay, at the straight time rate per working day of the position last occupied, for each full month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in section 4.

(b) One month's pay shall be computed by multiplying by 30 the calendar daily rate of pay received by the employee in the position last occupied prior to the time the agreement was approved.

Section 7(a). Any employee who is retained in the service of Pan American or TWA (or who is later restored to service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of the agreement, and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter (not to exceed 2 working days), used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier and the affected employee or his representative. No claims for expenses under this section shall be allowed unless they are incurred during the period in which Board approval of the agreement is effective and within

3 years from the date of the approval by the Board of the agreement, and the claim must be submitted within 90 days after the expenses are incurred.

(b) Changes in place of residence subsequent to the initial change caused by the agreement which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 8(a). The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of the carriers involved in this agreement (or who is later restored to such service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such agreement and is therefore required to move his place of residence.

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the approval date of the agreement to be unaffected thereby; *Provided, however,* That if the home is not sold within a substantial period after approval of the agreement, then the fair value of the home shall be determined as of a date as closely related to the date of a sale as possible, with an agreed-upon adjustment being made to exclude any effect of the agreement on such fair value. The carrier shall in each instance be afforded an opportunity to purchase the home at such

fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b). Changes in place of residence subsequent to the initial change caused by the agreement which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

(c). No claim for loss shall be paid under the provisions of this section which is not presented within 3 years after the date on which the agreement is approved.

(d). Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee or his representative and the carrier, and, in the event they are unable to agree the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the carrier,

respectively; these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser; and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 9. If either carrier, on or after December 17, 1974, shall rearrange or adjust its forces in anticipation of the agreement, with the purpo or effect of depriving an employee of benefits to which he should be entitled under these provisions as an employee immediately affected by the agreement, these provisions shall apply to such an employee as of the date when he is so affected.

Section 10. If requested in writing by any employee or employees of either carrier or the authorized representative of such employee or employees, the date and place of a meeting between said employees or their representatives and the representatives of the carriers to settle problems of the rearrangement of such employees arising out of and because of the agreement shall be agreed upon within 10 days after such request is received by the carrier. The meeting shall commence within 30 days from the date the request is received by the carrier.

In the event of a failure to agree upon a settlement of a problem or of problems presented at the meeting, the unsettled problems may be submitted by either party for adjustment in accordance with section 12.

Section 11. No employee of either carrier shall, as a condition of eligibility for the protection afforded by the terms of this order be required to accept employment that is not within the class, craft, or field of endeavor in which he was employed by either carrier on the date the agreement was approved by the Board.

Section 12(a). In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

(b). The above condition shall not apply if the parties by mutual agreement determine that an

alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties.

Section 13. The benefits of the foregoing sections shall not apply to employees stationed outside the United States who are not citizens of the United States.

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DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-884

In the Supreme Court of the United States

OCTOBER TERM, 1985

R. BANKS, ET AL., PETITIONERS

v.

PAN AMERICAN WORLD AIRWAYS, INC. AND ELIZABETH HANFORD DOLE, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Aeronautics Board abused its discretion in denying a claim for prejudgment interest on an award made in an arbitration proceeding under labor protective provisions imposed by the Board.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 763 F.2d 1399. The order of the Civil Aeronautics Board (CAB) (excerpts at Pet. App. 13-22) is reported at 103 C.A.B. 520. The CAB order denying reconsideration (Pet. App. 7-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1985. The petition for a writ of certiorari was filed on September 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1]The CAB's duties and responsibilities were transferred to the Department of Transportation at the end of 1984 under the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* and the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 *et seq.* Accordingly, the appropriate federal respondent has been substituted in place of the CAB. See Sup. Ct. R. 40.3.

STATUTE INVOLVED

Prior to its amendment in 1978, Section 401(j) of the Federal Aviation Act of 1958 (the Act), Pub. L. No. 85-726, 72 Stat. 756 (current version at 49 U.S.C. App. 1371(j)) provided as follows:

> No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest. Any interested person may file with the Board a protest or memorandum of opposition to or in support of any such abandonment. The Board may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

Prior to its amendment in 1978, Section 412 of the Act (72 Stat. 770) (current version at 49 U.S.C. App. 1382) provided as follows:

> (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, and or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

> (b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

Prior to its amendment in 1978, Section 416(b)(1) of the Act (72 Stat. 771) (current version at 49 U.S.C. App. 1386(b)(1)) provided as follows:

> The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

STATEMENT

1. In 1975, the Civil Aeronautics Board (CAB or Board) approved a large-scale international route exchange between Pan American World Airways (Pan American) and Trans

World Airlines in order to alleviate the two carriers' severe financial problems. *Pan Am-TWA, Route Restructuring Agreement*, 66 C.A.B. 1654 (1975). This action was taken under the CAB's authority to approve agreements among air carriers (§ 412), its authority to approve carrier suspensions of service (§ 401(j)), and its power to exempt carrier route changes from the Act's certificate authority requirement (§ 416(b)(2)). The Board conditioned its approval on the two carriers' acceptance of the Board's standard labor protective provisions (LPPs).[2] *Pan Am-TWA, Route Restructuring Agreement*, 67 C.A.B. 1327 (1975). Although the LPPs did not bar either carrier from dismissing employees, Section 4(a) of the LPPs required each carrier to pay allowances to employees dismissed because of the route exchange. Section 12 of the LPPs provided that disputes over dismissal allowance claims would be resolved by arbitration.

In 1976 and 1977, Pan American furloughed 418 flight engineers, almost all of whom claimed dismissal allowances. After Pan American denied their claims, the matter proceeded to lengthy arbitration. At the end of that process an arbitrator ruled that only 171 flight engineers lost their jobs as a result of the route exchange and were entitled to dismissal benefits. In subsequent proceedings, the arbitrator identified the claimants eligible for the payments. Petitioners, who were among the successful claimants, then asked the arbitrator to rule that Pan American was obligated to pay interest on their claims from the dates of dismissal. The arbitrator ruled that he had no authority to award interest on the flight engineers' claims, for his authority was limited to the scope of Section 4 of the LPPs and that section did not authorize an award of interest.

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[2]These standard LPPs were developed by the Board in airline merger and acquisition cases decided under Section 408 of the Act (72 Stat. 767) (current version at 49 U.S.C. App. 1378).

2. On review, the Board held that petitioners were not entitled to an award of interest.[3] As the Board pointed out (Pet. App. 15), "the LPPs by their terms do not require a carrier to pay prejudgment interest." The Board also noted that it "would have expressly said so" if it had intended "to impose as substantial a requirement" as an obligation to pay interest (*id.* at 16). Accordingly, imposing such an obligation on Pan American would constitute a retroactive amendment of the LPPs, a step the Board considered unfair (*id.* at 18-19), since Pan American had no notice until several years after the route exchange that any claimant would demand such interest. The record, moreover, contained "no signs" that Pan American had tried unreasonably to delay the completion of the arbitration (*ibid.*).

The Board also found that the denial of the interest claim was consistent with judicial practice, for courts do not automatically award prejudgment interest, particularly when, as here, the claims were unliquidated. The Board recognized that the National Labor Relations Board (NLRB) includes interest in back pay awards. However, those awards, unlike LPP payments, compensate employees for violations of federal law. In any event, the NLRB's practice is not binding on other agencies (Pet. App. 11-12, 20).

3. The court of appeals affirmed. It held that the award of prejudgment interest was a legal question within the Board's competency and that the Board's denial of interest was not arbitrary or capricious: "The Board correctly noted that the LPPs on their face do not provide for an

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[3]Petitioners also asked the Board to impose sanctions on Pan American for wi[illegible] delaying the arbitration and the payment of any allowances. The [illegible]ard concluded that petitioners had failed to show that Pan American had unreasonably delayed the proceeding. Pet. App. 21-22 & n.14.

award of interest, and that no statute or judicial decision mandates such an award" (Pet. App. 5). The court also agreed with the Board's conclusion that the NLRB's decisions did not create binding precedent (*ibid.*). While recognizing that Pan American had benefitted from the use of the allowance monies during the arbitration proceeding, the court affirmed the Board's conclusion that an interest award was not appropriate, since the Board had found that Pan American had not unreasonably delayed payment of the dismissal allowances (*id.* at 6).

ARGUMENT

The decision of the court of appeals affirming the Board's interpretation of the LPPs is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review by this Court is not warranted.

1. The Board and the court of appeals agreed that the LPPs by their terms do not require the payment of prejudgment interest on dismissal allowances (Pet. App. 5, 16), a conclusion not challenged by petitioners (Pet. 9). Neither the Fifth Amendment nor any federal statute or common law rule requires an award of prejudgment interest on a damage award when there is no other express legal entitlement to such interest. Instead, in cases analogous to this one, "[the] general rule is that in the absence of a statutory provision the award of prejudgment interest is in the discretion of the court." *Oil, Chemical & Atomic Workers Int'l Union* v. *American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977). Accord, *Taylor* v. *Philips Industries, Inc*, 593 F.2d 783, 787 (7th Cir. 1979); *Lodges 743 & 1746, Int'l Ass'n of Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976), citing *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962).

The court of appeals properly deferred to the Board's interpretation of the LPP program. The Board has the primary responsibility for interpreting the LPPs, for it developed the LPPs and "has the best understanding of what

those provisions are supposed to mean." *Wallace* v. *CAB*, 755 F.2d 861, 865 (11th Cir. 1985). Accordingly, the interpretation of the agency that drafted and administers the LPP standards is due "a high degree of deference." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 557 (1980).

2. The question whether the Board abused its broad discretion in this particular case does not, of course, warrant this Court's review. In any event, petitioners have failed to show that the Board exercised its discretion arbitrarily or irrationally. As shown, there is no general requirement that prejudgment interest be paid on claims created by federal law.[4] Petitioners' challenge to the Board's interpretation is grounded in large part on the misconception that Pan American breached a contractual obligation by failing to pay allowances to the claimants until several years after their dismissal (Pet. 11-12). The LPPs, however, entitled Pan American to an arbitration of its defense that few, if any, flight engineers were entitled to dismissal allowances. By finding that most claimants did not have valid claims for allowances, the arbitrator established that Pan American's initial refusal to pay was not unjustified.

3. Petitioners contend (Pet. 13-14) that the NLRB's policy of awarding interest in back pay cases and the Board's lack of an independent labor policy mandated the award of prejudgment interest here. This contention lacks merit. The NLRB's policy was not binding on the CAB — indeed, the courts do not consider themselves obligated to follow the NLRB's prejudgment interest policy in cases arising under other federal labor statutes. *Lodges 743 & 1747, Int'l Ass'n of Machinists* v. *United Aircraft Corp.*, 534 F.2d at

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[4]The Board found that Pan American had not unreasonably delayed the resolution of the flight engineers' dismissal allowance claims, a finding that petitioners did not challenge in the court of appeals. The start of the arbitration hearings, moreover, was delayed for 19 months by the parties' agreement. See Pet. App. 12.

446 (footnote omitted) ("no sound reason" exists why the courts should "rigidly adopt the identical remedies employed by the NLRB on actions involving unfair labor practices"); *De Arroyo* v. *Sindicato De Trabajadores Packinghouse*, 425 F.2d 281, 290 (1st Cir. 1970); *Oil, Chemical & Atomic Workers Int'l Union* v. *American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977).

Petitioners' argument ignores the fact that the Board's LPPs are based on its transportation responsibilities, not on a national labor policy. As the court of appeals noted (Pet. App. 5), "the CAB's major concern is the regulation of the airline industry, not the promotion of any specific labor policy." See also *Kent* v. *CAB*, 204 F.2d 263, 265 (2d Cir. 1953); *Air Line Employees Ass'n* v. *CAB*, 413 F.2d 1092, 1094-1095 (D.C. Cir. 1969).[5]

4. No other court has ever ruled on an employee's entitlement to interest on LPP benefits, so there is no conflict among the circuits. The alleged conflict cited by petitioners (Pet. 20) does not involve any dispute over a general federal rule on the award of prejudgment interest. Instead, the cited conflict concerns the question whether the Warsaw Convention's maximum limit on air carrier liability for accidents diminishes a court's authority to include interest in damage awards made under the Convention. The cases cited by petitioners, *Eastern Air Lines* v. *Mahfoud*, aff'd by equally divided Court, No. 83-1807 (Dec. 10, 1985) and *O'Rourke* v. *Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984), do not purport to establish a general rule on prejudgment interest outside Warsaw Convention cases.

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[5]Petitioners misconstrue the nature of the dismissal allowances in referring to them as "backpay" (Pet. 17, 18), for the LPPs do not preclude a carrier from discharging employees. The allowances are intended to provide some compensation to furloughed employees, not to punish violations of law or Board orders.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

R. BANKS, ET AL.,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC. and
ELIZABETH HANFORD DOLE,
SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT PAN AMERICAN WORLD AIRWAYS, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Aeronautics Board abused its discretion in denying a claim for prejudgment interest on an award made in an arbitration proceeding under labor protective provisions ("LPPs") which the Board imposed upon an employer not subject to the provisions of the Labor Management Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 763 F.2d 1399. The order of the Civil Aeronautics Board ("CAB") (excerpts at Pet. App. 13-22) is reported at 103 C.A.B. 520. The CAB order denying reconsideration (Pet. App. 7-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1985. The petition for a writ of certiorari was filed on September 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

PRELIMINARY STATEMENT

For the convenience of the Court respondent Pan American World Airways, Inc. ("Pan Am") adopts and incorporates by reference the Brief In Opposition submitted by its co-respondent, ELIZABETH HANFORD DOLE, SECRETARY OF TRANSPORTATION. Therefore, Pan Am herein sets forth only one supplemental argument which it believes was not fully addressed in the federal respondent's brief.

ARGUMENT

PETITIONER'S RELIANCE UPON THE POLICIES, PROCEDURES AND PRECEDENTS OF THE NATIONAL LABOR RELATIONS BOARD ("NLRB") IS MISPLACED.

The Labor Management Relations Act ("LMRA") 29 U.S.C. §141, *et seq.*, from which the NLRB derives its jurisdiction, specifically, at 29 U.S.C. §182, *excludes* from its coverage railroads and airlines, such as Pan Am, subject to the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*, 181).

Petitioners are, accordingly, incorrect in their contention that "but for the CAB's imposition of the LPP's the Petitioners would have had access to redress their grievances under the full panoply of the NLRB's rules, policies and precedents." (Pet. 5) The

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[1] The CAB's duties and responsibilities were transferred to the Department of Transportation at the end of 1984 under the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 et seq. and the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 et seq. Accordingly, the appropriate federal respondent has been substituted in place of the CAB. See Sup. Ct. R. 40.3.

NLRB would have no jurisdiction as to *any* issue which might arise between Pan Am and its employees.

Moreover, even in *labor* cases not involving unfair labor practices in industries where the LMRA governs the employer-employee relationship, the courts do *not* consider themselves bound by NLRB remedies that might be imposed on employers found to have committed an unfair labor practice. See, *e.g.*, *Lodge 743 & 1747, Int'l Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975).

As the NLRB has no jurisdiction over Pan Am or its employees, and as the CAB's LPP's are in no way related to a finding of an unfair labor practice, there is no logical basis, let alone legal basis, to require the award of prejudgment interest to LPP recipients merely because the NLRB may, on some occasions, award such prejudgment interest in unfair labor practice cases.

CONCLUSION

For the reasons set forth above and for the reasons set forth in the federal respondent's brief, the petition for a writ of certiorari should be denied.

Dated: January 14, 1986

Respectfully submitted,

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